IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-0403

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SHAWN DAVID STRONG,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Seventh Judicial District Court,
Praire County, The Honorable Richard A. Simonton, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 9

SUMMARY OF THE ARGUMENT 15

ARGUMENT 17

I. THE DISTRICT COURT CORRECTLY DENIED STRONG'S MOTION TO DISMISS FOR UNNECESSARY DELAY IN HIS INITIAL APPEARANCE. 17

A. Standard of Review 17

B. Strong Has Shown No Prejudice or Impairment of His Defense Related to the Delay In This Case. 17

C. The Remedy for Unnecessary Delay in the Initial Appearance Is Exclusion of Evidence Acquired as a Result of the Delay, Not Dismissal. 19

II. THE DISTRICT COURT PROPERLY AND WITHIN ITS DISCRETION DENIED STRONG'S MOTION FOR MISTRIAL. 22

A. Standard of Review 22

B. The District Court Properly Admitted, on Redirect Examination, Finneman's Explanation of the Circumstances and Influences Under Which She Made An Inconsistent Statement to Police With Which Strong Impeached Her Credibility on Cross-Examination. 22

TABLE OF CONTENTS
(Cont.)

C. Even if Finneman's Testimony Were Inadmissible, Denial of Mistrial Was Within the Court's Discretion Given the Strength of the Evidence Against Strong Outweighing the Limited Prejudice of the Testimony and the Need for a Curative Instruction. 28

III. THE DISTRICT COURT IMPOSED A LEGAL SENTENCE WHEN IT ORDERED STRONG TO PAY RESTITUTION TO BLUE CROSS BLUE SHIELD FOR THE UNDISPUTED MEDICAL EXPENSES INCURRED BY THE VICTIM. 33

A. Standard of Review 33

B. The Restitution Order Was Within Statutory Parameters and Strong Makes No Colorable Claim That Blue Cross Blue Shield Is Not an Insurer With a Right of Subrogation. 35

C. Strong Did Not Object to the Amount of Restitution He Was Ordered to Pay to Blue Cross Blue Shield, or to the Lack of an Affidavit. 39

CONCLUSION 41

CERTIFICATE OF SERVICE 42

CERTIFICATE OF COMPLIANCE 43

TABLE OF AUTHORITIES

CASES

Cissel v. Western Plumbing & Heating,
188 Mont. 149, 612 P.2d 206 (1980).....23, 24, 32

City of Billings v. Peterson,
2004 MT 232, 322 Mont. 444, 97 P.3d 532 17

Cline v. Durden,
246 Mont. 154, 803 P.2d 1077 (1990).....23, 25, 28

Commonwealth v. Douglas,
236 N.E.2d 865 (Mass. 1968).....24

Commonwealth v. Williams,
393 N.E.2d 937 (Mass. 1979).....24

Du Vivier v. Phillips,
18 Mont. 370, 45 P. 554 (1896).....24

Fitzpatrick v. Crist,
165 Mont. 382, 528 P.2d 1322 (1974).....21

Kennelly v. Savage,
18 Mont. 119, 44 P. 400 (1896).....24

State v. Benbo,
174 Mont. 252, 570 P.2d 894 (1977).....17, 18, 19, 21

State v. Berger,
1998 MT 170, 290 Mont. 78, 964 P.2d 725 .....22, 23, 27

State v. Board,
135 Mont. 139, 337 P.2d 924 (1959).....25, 27

TABLE OF AUTHORITIES
(Cont.)

State v. Brown,
1999 MT 339, 297 Mont. 427, 993 P.2d 672 .....19, 20, 21

State v. Coluccio,
2009 MT 273, 352 Mont. 122, 214 P.3d 1282 .....39, 40

State v. Dieziger,
200 Mont. 267, 650 P.2d 800 (1982).....passim

State v. Dubois,
2006 MT 89, 332 Mont. 44, 134 P.3d 82 32

State v. Duffy,
2000 MT 186, 300 Mont. 381, 6 P.3d 453 .....22, 23

State v. Gatlin,
2009 MT 348, 353 Mont. 163, 219 P.3d 874 .....20, 21

State v. Giddings,
2009 MT 61, 349 Mont. 347, 208 P.3d 363 31

State v. Heaston,
109 Mont. 303, 97 P.2d 330 (1939).....23

State v. Hope,
2003 MT 191, 316 Mont. 497, 74 P.3d 1039 18

State v. Hunt,
2009 MT 265, 352 Mont. 70, 214 P.3d 1234 39

State v. Johnson,
1998 MT 289, 291 Mont. 501, 969 P.2d 925 29

State v. Johnston,
140 Mont. 111, 367 P.2d 891 (1962).....20

TABLE OF AUTHORITIES
(Cont.)

State v. Keays,
97 Mont. 404, 34 P.2d 855 (1934).....24, 25, 27

State v. Kelley,
2005 MT 200, 328 Mont. 187, 119 P.3d 67 24

State v. Kirkland,
2008 MT 107, 342 Mont. 365, 181 P.3d 616 .....33, 34

State v. Kotwicki,
2007 MT 17, 335 Mont. 344, 151 P.3d 892 34

State v. Kougl,
2004 MT 243, 323 Mont. 6, 97 P.3d 1095 .....38, 41

State v. Lenihan,
184 Mont. 338, 602 P.2d 997 (1979).....34

State v. Lias,
218 Mont. 124, 706 P.2d 500 (1985).....22, 27

State v. McQuiston,
277 Mont. 397, 922 P.2d 519 (1996).....25

State v. Micklon,
2003 MT 45, 314 Mont. 291, 65 P.3d 559 34

State v. Neary,
284 Mont. 409, 944 P.2d 750 (1997).....24

State v. Nelson,
139 Mont. 180, 362 P.2d 224 (1961).....17

State v. O'Connor,
2009 MT 222, 351 Mont. 329, 212 P.3d 276 .....33, 34, 37, 40

TABLE OF AUTHORITIES
(Cont.)

State v. Partin,
287 Mont. 12, 951 P.2d 1002 (1997).....22, 28, 29, 31

State v. Passmore,
2010 MT 34, ___ Mont. ___, ___ P.3d ___ 22

State v. Reutzel,
130 Idaho 88, 936 P.2d 1330 (Idaho Ct. App. 1997) 18

State v. Rodriguez,
192 Mont. 411, 628 P.2d 280 (1981).....17, 18

State v. Rosling,
2008 MT 62, 342 Mont. 1, 180 P.3d 1102 29

State v. Sage,
221 Mont. 192, 717 P.2d 1096 (1986).....29

State v. Scarborough,
2000 MT 301, 302 Mont. 350, 14 P.3d 1202 .....28, 32

State v. Schmidt,
2009 MT 450, 354 Mont. 280, ___ P.3d ___ 34, 39, 40

State v. Sharp,
2006 MT 301, 334 Mont. 470, 148 P.3d 625 .....35, 38

State v. Veis,
1998 MT 162, 289 Mont. 450, 962 P.2d 1153 .....25, 26

State v. Weldele,
2003 MT 117, 313 Mont. 452, 69 P.3d 1162 .....28, 32, 33

State v. Wright,
2001 MT 282, 307 Mont. 349, 42 P.3d 753 37

TABLE OF AUTHORITIES
(Cont.)

OTHER AUTHORITIES

Montana Code Annotated
§ 46-7-101 ..... 17, 20, 21
§ 46-7-101(1) 2, 17
§ 46-7-102 20
§ 46-8-101 20
§ 46-18-112(1)(e) 36, 37, 39
§ 46-18-112(1)(f) 36, 37, 39
§ 46-18-201(5) 35
§ 46-18-241(1) 35
§ 46-18-242 39
§ 46-18-242(1) 40
§ 46-18-242(1)(b) 39
§ 46-18-243(1)(a) 35
§ 46-18-243(2)(a)(iv) 35, 36

Montana Rules of Evidence
Rule 101(c)(3) 39
Rule 402 5
Rule 404 ..... 5, 26
Rule 404(b) 27, 31
Rule 611(b) 22
Rule 611(d) 23, 25
Rule 613 ..... 22, 27
Rule 613(b) 25

Wigmore on Evidence
§ 1044 24

Jones on Evidence
Vol. 5 25

STATEMENT OF THE ISSUES

1. Did the district court correctly deny Strong's motion to dismiss for unnecessary delay between his arrest and initial appearance?

2. Did the district court properly and within its discretion deny Strong's motion for mistrial?

3. Did the district court enter a legal sentence when it ordered Strong to pay restitution to Blue Cross Blue Shield for its payment of undisputed medical expenses incurred by the victim?

STATEMENT OF THE CASE

On March 28, 2008, the State charged Appellant Shawn Strong (Strong) with felony aggravated assault, or, in the alternative, felony assault on a minor, for purposely or knowingly causing serious bodily injury, or bodily injury, to his two-year-old son, K.S. (D.C. Doc. 2, 3.) The State alleged that K.S., under the sole care of Strong, suffered a severe force trauma to the abdomen and Grade III laceration of the liver. (D.C. Doc. 1 at 2-3, 4.) Strong was arrested the same day pursuant to a warrant issued by the district court, the Honorable Richard Simonton presiding (Judge Simonton). (D.C. Doc. 4.)

One month later, on April 28, 2008, Strong was assigned counsel. (D.C. Doc. 5.) Strong promptly filed a Motion to Dismiss (D.C. Doc. 6), which was later

withdrawn because it was "well taken" that probable cause for the charges was satisfied by the Information filed in this case. (Tr. at 20.) Additional co-counsel was later appointed. (D.C. Doc. 11.)

On May 9, 2008, 42 days after his arrest and the filing of charges, Strong had an initial appearance before Justice of the Peace Ed Williamson, acting for Judge Henry, in the Prairie County Justice Court, and Strong was bound over to the district court. (Order and Initial Appearance Form, D.C. Doc. 7.) On the State's motion, Strong's arraignment in the district court was set and held on June 4, 2008, and he pleaded not guilty to the charges. (June 4, 2006 [sic] Minute Order, no number in D.C. file.)

Strong's Motion to Dismiss for Unnecessary Delay of Initial Appearance

Strong filed a second Motion to Dismiss and Brief in Support, alleging due process violations under the U.S. and Montana Constitutions and violation of Mont. Code Ann. § 46-7-101(1) for unnecessary delay between Strong's arrest and his initial appearance. (D.C. Doc. 24 at 1, 4-5.) The State filed a response asserting there was no evidence of actual prejudice from the delay and the remedy, if any, was not dismissal but suppression of evidence obtained as a result of that delay. (D.C. Doc. 26 at 2, 4.)

The district court held a hearing on the motion to dismiss. (Tr. at 5, 19-27.) Both Strong and the State mistakenly argued that Strong's initial appearance was

68 days after arrest on June 4, but the district court pointed out the May 9 initial hearing in justice court appearing in the file (D.C. Doc. 7), resulting in a 42-day delay, and gave the parties additional time to "supplement" based on that information. (Tr. at 26-27.) In light of the shorter, 42-day delay, Strong filed no additional documentation. The State filed proposed findings of fact, conclusions of law and order. (D.C. Doc. 32 at 2, 4-5.)

The district court denied Strong's motion to dismiss. (D.C. Doc. 34 at 3-4.) The court found there was no indication of prejudice from the delay, and that because Strong had not bonded out of jail since the May 9 initial appearance, there was no indication an earlier hearing would have resulted in his release from incarceration any sooner. (Id.) The district court noted State v. Dieziger, 200 Mont. 267, 650 P.2d 800 (1982), in which a 42-day delay did not justify a defendant's release. (Id. at 4.) The court found Strong did not "explain nor even argue that his defense was impaired or that his incarceration was enhanced by" the delay in this case. (Id.) Even if the statute were violated, the proper remedy would be suppression of improperly obtained evidence. (Id.) Finally, the district court concluded, "Dismissal of the charges against the Defendant would be an extreme remedy under the facts of this case." (Id.)

Strong's Motion for Mistrial

Before trial, Strong filed a motion in limine for the exclusion of evidence of "other crimes or other bad acts" committed by Strong, specifically including evidence exemplifying his anger control issues, prior drug use, or current incarceration. (D.C. Doc. 42.) In general, the State indicated it had no intention of introducing such evidence and the district court granted Strong's motion. (Tr. at 38-39.) Strong pushed for further clarification, however, as to his "temper problems, issues about that he was on prescription medication four years ago, those things, issues where he may have punched a wall at some time in the past, things of that nature." (Tr. at 40.) After hearing argument from the State and Strong, the district court stated, "I'm not going to make a blanket exclusion of such evidence. Don't refer to it in opening statements. If it comes up during the trial, make an appropriate objection, and we will consider it at that time." (Tr. at 40-41.)

At trial, Teal Finneman, K.S.'s mother, testified that when she came home from work on the night K.S. was hurt, Strong "had the recliner pulled up to the TV, and he was playing video games. And [K.S.] was laying on the couch a couple feet behind him." (Tr. at 183.) On cross-examination, defense counsel elicited from Finneman that her statement to the police was that Strong was "holding and cuddling" K.S. on the couch and did not mention him playing video games. (Tr. at 198.)

Based on this inconsistent statement, Strong attacked and impeached Finneman's credibility--"You admit that at times you didn't tell the truth" and now "we're supposed to believe that you are [telling the truth] and [believe] everything you say?" (Tr. at 198-99.) Finneman admitted she was not telling the truth to the officer at the time she gave her statement, but was telling the truth at trial. (Tr. at 198.)

Immediately on redirect examination, Finneman confirmed that she had changed her testimony from her prior statement to police. (Tr. at 199.) Finneman said she changed her testimony because, at the time of her statement to police, she was "scared of Shawn." (Tr. at 199-200.)

Strong objected to further questioning based on relevance and prejudice under Mont. R. Evid. 402 and 404. (Tr. at 200.) The State responded that Strong opened the door, "He basically called her a liar, and she is certainly entitled to explain the change in her attitude and her statement." (Tr. at 200.) The district court agreed, "[Strong] indicated that testimony was different to Officer Dahl. And now she certainly is allowed to explain why it's different. She indicated because she was scare[d] of the defendant. I'm going to allow you to ask the next obvious question: Why. But don't push it beyond that." (Tr. at 200.) Strong protested that it might also violate his motion in limine. (Tr. at 201.)

The State went ahead and asked why Finneman was scared of Strong, and she responded: "Because he had been violent toward me in the past." (Tr. at 201.) Strong moved for a mistrial based on "this testimony that was just elicited by the county attorney." (Tr. at 201.) The district court denied the motion.

On the second day of trial, the district court explained its ruling on Strong's motion for mistrial. (Tr. at 251-52.) The district court, again, explained that the question and answer were logical under the circumstances:

> She could have been scared the charges would have been filed against her, the charges would have been filed against the defendant. She could have been scared because she was afraid her child may be taken away from her, or she could have been scared because of some type of action by the defendant.
>
> Rather than leave the jury wonder what she was scared of, I didn't think it was fair to them or it was fair to anybody else. Under the circumstances, I don't think the witness's answer got into other acts. I think it was simply an explanation of a number of possible reasons why she could have been scared.

(Tr. at 251-52.)

The district court determined that a cautionary instruction was not necessary, and the general instructions were sufficient without emphasizing anything else. (Tr. at 251, 252.) The State said it would not object to a cautionary or limiting instruction, but Strong did not request one. (Tr. at 252.) The district court admonished the State not to "get into the area of violence" in its final argument.

(Tr. at 252.) "She indicated she was scared. She's scared of the defendant, apparently, and I don't think you have to pursue it beyond that." (Tr. at 252.)

Sentencing

The jury returned a unanimous verdict of guilty to the charge of aggravated assault. (Tr. at 345-47.) The district court ordered a presentence investigation report (PSI) (Tr. at 348), the original of which was filed with the district court on March 20, 2009. (No number in D.C. file.)

The district court sentenced Strong as a persistent felony offender (see D.C. Doc 12) to 40 years in Montana State Prison with 20 years suspended and parole ineligibility for the first 10 years; this sentence to run consecutively to Strong's other previously imposed sentences. (D.C. Doc. 51 at 2; Tr. at 353-54, 394-95.) The district court imposed conditions of suspended sentence, including the payment of restitution in the amount of $11,194.11 to Blue Cross/Blue Shield Insurance and $25 to the Holy Rosary Hospital in Miles City. (D.C. Doc. 51 at 2-8; Tr. at 395-99, 397.)

The victim's impact and restitution portion of the PSI related that the primary victim of Strong's offense, K.S., suffered potential life-threatening injuries which required "significant medical attention and care in medical facilities in Montana." (PSI at 6.) The PSI reported that the medical expenses incurred by K.S.'s hospitalization totaled $11,219.11, of which Blue Cross Blue Shield

Insurance paid $11,194.11. (Id.) The PSI recommended that Strong was responsible for restitution in the total amount of $11,219.11--$11,194.11 owing to Blue Cross Blue Shield Insurance, and $25 owing to Holy Rosary Hospital. (Id. at 9, 13.)

At the sentencing hearing the PSI author testified that his investigation revealed that the above restitution was appropriate and made that recommendation. (Tr. at 364-65, 371-72.) On cross-examination by Strong, the PSI author clarified that $11,194.11 was the amount the insurance company, Blue Cross Blue Shield, paid. (Tr. at 374.)

Strong received the PSI, reviewed it with his attorney, understood it, and made only one factual objection, not related to the restitution for medical expenses incurred. (Tr. at 350-51.) Strong expressly stated on the record that he did not object or contest the fact that Blue Cross Blue Shield paid the amount reported, $11,194.11. (Tr. at 382.)

Strong asked that restitution to Blue Cross Blue Shield be stricken, because, "They are not a victim." (Tr. at 381-82.) Strong argued restitution was appropriate for the "out-of-pocket costs" of the victim or his mother, but was not appropriate "if there's no punitive loss to the victims that's defined in 46-18-112(1)(e)." (Tr. at 382.) Strong asserted that the $25 restitution ordered to the hospital was probably the only "out-of-pocket" money. (Tr. at 382.)

The district court ordered the $11,194.11 restitution to Blue Cross Blue Shield, finding, "They were out that sum simply because of an insurance contract. I look at them as a victim." (Tr. at 397.)

Strong appealed. (D.C. Doc. 53.)

STATEMENT OF THE FACTS

Between 6 p.m. on March 24, 2008, and 6 a.m. on March 25, 2008, two-year-old K.S. was at home in Terry, Montana, and suffered a Grade III laceration of his liver. (Tr. at 174, 183-84, 230, 268-69.) The only person at home with K.S. that night was his 21-year-old father, Strong. (Tr. at 173, 180, 192.)

K.S.'s mother, Finneman, was at work as a certified nurse's assistant on the night shift at the local nursing home. (Tr. at 174-75, 178-79.) Strong had recently returned to live with Finneman and K.S. after an absence of almost two years. (Tr. at 173, 178.) Finneman described their household as stressful--money was tight, bills were adding up, Finneman was working but Strong wasn't, and there were tensions between Finneman, her parents, and Strong. (Tr. at 173-74, 175-76, 204.) Strong was looking for work, but spent his days playing video games. (Tr. at 175.)

After Strong came to live with them, Finneman usually took K.S. to day-care so she could sleep and Finneman's parents would watch him at night when she was at work. (Tr. at 176, 204.) At first Strong did not provide any of the child care and

had no significant time caring for K.S. (Tr. at 176-77.) Finneman described his parenting skills as strict and "lacking." (Tr. at 178.) Strong would interact with K.S. but often wanted to be alone and would get upset when K.S. didn't finish a meal; he thought Finneman and her parents were spoiling K.S., he called it "ruining him." (Tr. at 177-78.) When the money started to get tight and Finneman didn't have the money to pay for child care, Strong started taking care of K.S. (Tr. at 177.)

On the night in question, Finneman left for work and left K.S. in the care of Strong. (Tr. at 179.) No one else was there, just Strong and K.S. (Tr. at 180, 285.) When she left, K.S. was "normal: happy and playful" and nothing out of the ordinary had happened before she left for work. (Tr. at 179.)

Between 9 and 10 p.m., Strong called Finneman to check in and reported that K.S. had eaten well and "that he was good." (Tr. at 180.) About 3 a.m., Strong sent a text message and then spoke on the phone with Finneman to tell her that K.S. had thrown up his supper. (Tr. at 181.) Finneman was not too concerned at that point, as K.S. had been sick with the flu a few weeks before, and she advised Strong to clean him up, have him sit up a little to rest his stomach, then try to lay him back down again. (Tr. at 181.) An hour or two later, Strong called Finneman again, K.S. had vomited again. (Tr. at 181-82.) Again, Finneman thought K.S.'s stomach was just upset, as she said, "He was fine when I left." (Tr.

at 182.) Finneman instructed Strong and said she would check on K.S. when she got home, in about an hour. (Tr. at 182.)

When Finneman got home from work, Strong was playing video games in the recliner and K.S. was behind him on the couch. (Tr. at 183.) K.S. grunted when Finneman moved him and acted like it hurt when she picked him up. (Tr. at 183.) K.S.'s behavior concerned Finneman, and she notice faint bruising on his collar bone and brown freckles--later described as "petechiae" by the doctors--all over his face that were not there when Finneman left for work. (Tr. at 183-84, 262-64.) Later that morning when K.S. got up after a little rest, he looked the same--"just fragile . . . he just didn't want to move." (Tr. at 184.)

Finneman called her mother, Mary Johnson, who was a nurse, and asked her to come over. (Tr. at 184, 185, 206.) Johnson was shocked and concerned by K.S.'s appearance--he was "lifeless and pale," with petechiae around the eyes, stooped over when he walked, and couldn't get his full breath--and she took him to the physician's assistant in town. (Tr. at 185, 207-09.) Johnson said K.S. "being thrown" or sick with the flu did not add up to his symptoms. (Tr. at 208.) Johnson described K.S.'s symptoms for the PA and, as a "mandatory reporter," told him not to rule out child abuse. (Tr. at 209.) The next day, K.S. was not getting any better--he was getting worse and having a difficult time standing up. (Tr. at 186-87, 210-11.)

At that point, on March 26, they took K.S. to see pediatrician Dr. Lourdes Reynolds, who examined K.S., ordered a CAT scan and lab work, and refered K.S. to Dr. David Kaderis, a surgeon at Holy Rosary Hospital in Miles City. (Tr. at 211, 225, 230, 255, 257-62, 265, 268, 273-74.) K.S. was admitted to the hospital and remained there approximately a week. (Tr. at 211-12.)

Johnson described K.S.'s condition at the hospital as not active, just not doing anything, still pale, with a distended abdomen, and, "You could definitely tell he was hurt." (Tr. at 212.) Dr. Reynolds said K.S. looked stiff, scared, not well, and appeared to be in pain--abdominal pain in particular. (Tr. at 258-59, 260.) The abdominal exam was not normal--K.S. was bloated, very tender, and "guarding all quadrants." (Tr. at 260.) Dr. Reynolds also observed some faint bruising on his chest and face, and the petechiae around the temple--indicative of bursting blood vessels from increased pressure due to a variety of causes. (Tr. at 262-64.) Dr. Kaderis observed K.S. as stable, but in pain, crying, and unable to walk. (Tr. at 229.)

Blood tests showed "sky-high liver enzymes" indicative of liver injury. (Tr. at 266-68.) Results of a CAT scan showed an "extensive laceration" of his liver, classified as a Grade III laceration of the liver. (Tr. at 268-69.) Dr. Kaderis diagnosed the injury as a "traumatic, Grade III liver laceration." (Tr. at 230.) The laceration extended in a star-like pattern across two lobes of the liver and very

close to the vena cava, a large vein in the liver. (Tr. at 231-32.) The doctors considered this to be a serious, life threatening injury. (Tr. at 231, 232, 270-71.) K.S.'s liver function was impaired and it was very painful. (Tr. at 271.)

Dr. Reynolds said a Grade III laceration to the liver can only be caused by significant forces, "pretty severe blunt abdominal" forces. (Tr. at 271.) Dr. Reynolds had recently seen a couple of liver lacerations--where a boy was run over by a horse-driven carriage and a car backed up over a little girl. (Tr. at 271-72.) Dr. Kaderis said such an injury requires "a high level of force that has to be concentrated in a small area." (Tr. at 233.) Examples of the type of incidents generating enough force included: motor vehicle accidents; falls from a height greater than ten feet; or being kicked by a horse--none of which K.S. was apparently exposed to. (Tr. at 233.) Also, according to Dr. Kaderis, "The other option always with these is a potential abuse." (Tr. at 233.) The doctors said falling or jumping off of furniture would not generate sufficient force to cause this kind of laceration. (Tr. at 233-34, 272.) Nor would a child be able to inflict it upon himself. (Tr. at 234, 272-73.)

The symptoms of such an injury were described by the doctors and matched what K.S. had exhibited: vomiting; crying; pain; not moving. (Tr. at 234, 273.) Dr. Kaderis said children's bodies would not "necessarily show the external signs of trauma because they're so flexible." (Tr. at 235-36.)

Finneman initially asked Strong a few times what had happened, if K.S. had fallen, if anything went wrong, or if he heard K.S. crying. Strong said no. (Tr. at 185.) Strong accompanied Finneman and K.S. to the hospital, but he said he did not want to be there. (Tr. at 189.) Finneman said, "He told me that he wanted to go home. That he wasn't going to stay here all day." (Tr. at 189.)

After returning from the hospital, Finneman tried to get Strong to talk, but he said he had "no idea." (Tr. at 189-90.) Strong told Finneman that maybe K.S. had fallen on a toy when he was playing, or maybe he got hurt when Strong would "toss him onto the couch or onto the bed," or maybe K.S. jumped off the couch cushions, or maybe he got it when Strong "made him crawl out of the crib after he vomited." (Tr. at 190, 193-194.) Strong did not mention any of these events happening during their phone calls on the night of March 24-25, and he did not mention K.S. having any accident that night. (Tr. at 190.)

Strong also agreed to an interview with law enforcement, as testified to by DCI Agent Marvin Dahl. (Tr. at 282-83.) Strong explained the game he played with K.S., tossing him on the bed, but did not indicate that anything out of the ordinary happened during that activity. (Tr. at 283.) About the night's events and K.S.'s behavior, Stong said, "Nothing occurred. It was a good evening." (Tr. at 284.) Strong confirmed that he and K.S. were alone that night. (Tr. at 285.) Strong was unable to provide any information about how K.S. had been injured.

(Tr. at 285.) Agent Dahl testified that Strong's theory was that Johnson was conspiring against him with the doctors that examined K.S., but Agent Dahl found no evidence of a conspiracy. (Tr. at 289.)

SUMMARY OF THE ARGUMENT

This Court should reject each of Strong's assignments of error. First, Strong has alleged no prejudice resulting from the 42-day delay between his arrest and initial appearance. Even assuming prejudice, the proper remedy for unnecessary delay in initial appearance is the suppression of evidence obtained as a direct result of the delay--and here there was no such evidence. Dismissal, as requested by Strong, is an inappropriate remedy.

Second, the district court properly and within its discretion denied Strong's motion for mistrial. When a defendant impeaches a witness on cross-examination using the witness's prior inconsistent statement, the witness may, on re-examination, explain the circumstances of the inconsistent statement. Strong opened the door to the witness's credibility and her inconsistent statement, and the jury was entitled to hear the explanation, even if it contained evidence of other acts.

Should this Court determine Finneman's statement was inadmissible, denial of mistrial was discretionary, given the overwhelming evidence of guilt against

Strong in relation to the limited prejudicial effect of the statement. Further, the district court found that a cautionary instruction was unnecessary, and Strong did not request one.

Third, restitution to Blue Cross Blue Shield was within statutory parameters, and not an illegal sentence. Strong failed to object to the restitution order on the grounds asserted on appeal--that there was no evidence of a subrogation right and the PSI did not contain an affidavit of the pecuniary loss. Strong does not argue that Blue Cross Blue Shield is not an insurer with a subrogation right (only that there was no evidence of it at sentencing), so there is no colorable claim that the restitution order was illegal. Nor is there a colorable claim that the lack of an affidavit renders restitution illegal where Strong has conceded that the amount paid by Blue Cross Blue Shield was correct. Finally, Strong's ineffective assistance of counsel claims must fail because a plausible strategic justification exists for not objecting: Strong had no legitimate reason based in fact to dispute either the existence of the insurer's subrogation right or the correctness of the amount of restitution claimed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED STRONG'S MOTION TO DISMISS FOR UNNECESSARY DELAY IN HIS INITIAL APPEARANCE.

A. Standard of Review

Whether an initial appearance violated Mont. Code Ann. § 46-7-101(1), is a question of statutory construction, which this Court reviews for correctness. City of Billings v. Peterson, 2004 MT 232, ¶ 13, 322 Mont. 444, 97 P.3d 532.

B. Strong Has Shown No Prejudice or Impairment of His Defense Related to the Delay In This Case.

"A person arrested, whether with or without a warrant, must be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance." Mont. Code Ann. § 46-7-101(1). The purpose of this statute is to insure that the person arrested is advised of the charge made against him in order to enable him to prepare a defense, and to protect him from being held incommunicado for protracted periods of time. State v. Benbo, 174 Mont. 252, 260, 570 P.2d 894 (1977) (citing State v. Nelson, 139 Mont. 180, 188, 362 P.2d 224 (1961)). However, it is only if the defendant "can show prejudice or a deliberate attempt by the prosecution to circumvent a speedy arraignment" that this Court will fashion an appropriate remedy for violation of the Mont. Code Ann. § 46-7-101 requirement for an initial hearing "without unnecessary delay." State v. Rodriguez, 192 Mont. 411, 417-18, 628 P.2d 280, 284 (1981) (no

prejudice shown from lapse of 20 days) (citing Benbo); see also State v. Reutzel, 130 Idaho 88, 93, 936 P.2d 1330, 1335 (Idaho Ct. App. 1997) (citing cases from other jurisdictions requiring prejudice from delay before making remedy available).

In each of the cases this Court has reversed for delay in initial appearance, there has been some prejudice in the form of evidence obtained from the defendant directly related to the delay that impaired the defense of the case. See State v. Hope, 2003 MT 191, ¶ 17, 316 Mont. 497, 74 P.3d 1039 (letters written by defendant during delay before initial appearance should have been suppressed); Benbo, 174 Mont. at 262 (statements and evidence discovered when police drove defendant around the state to locate evidence should have been suppressed). On the other hand, this Court has affirmed where, as in this case, the defendant is unable to show any prejudice from the delay. Dieziger, 200 Mont. at 270; Rodriguez, 192 Mont. at 417-18.

This Court should affirm the district court's denial of Strong's motion to dismiss, because Strong has shown no prejudice from the delay between his arrest and initial appearance. The State concedes on the facts of this case--42 days of delay, during which Strong was incarcerated--that such delay was "unnecessary" under the statute. (See D.C. Doc. 32 at 5.) But without any showing of prejudice from the delay, there is nothing to remedy. In fact, even the remedy proposed by

Strong on appeal--dismissal "without prejudice"--is consistent with the district court's finding of no prejudice.

Pretrial, Strong argued the delay in this case was "on its face" prejudicial, without putting on any evidence. (Tr. at 21.) As found by the district court, there was no indication of prejudice from the 42-day delay in this case, and Strong did not "explain nor even argue that his defense was impaired or that his incarceration was enhanced by" the delay in this case. (D.C. Doc. 34 at 3-4.) The district court recognized the statute's purposes and concluded, even if the statute were violated, the proper remedy would be suppression of improperly obtained evidence. (Id.) Nothing appears in the record to show that the State obtained any information or evidence from Strong as a direct result of the delay between his arrest and his initial appearance.

C. The Remedy for Unnecessary Delay in the Initial Appearance Is Exclusion of Evidence Acquired as a Result of the Delay, Not Dismissal.

The remedy for unnecessary delay in initial appearance--assuming the defendant shows prejudice from the delay--is exclusion of evidence acquired as a result of that delay. State v. Brown, 1999 MT 339, ¶ 16, 297 Mont. 427, 993 P.2d 672; State v. Dieziger, 200 Mont. at 270 (proper remedy for violation of section 46-7-101 is suppression of improperly obtained evidence); Benbo, 174 Mont. at 261-62 (approving test for exclusion of all evidence obtained during any

"unreasonable delay," except for that which has no reasonable relationship to the delay whatsoever); but see State v. Johnston, 140 Mont. 111, 114, 367 P.2d 891, 892 (1962) (if there is any remedy at all "it must be found in a civil action"). Contrary to Strong's argument on appeal--seeking dismissal without prejudice--"dismissal is an inappropriate remedy." Dieziger, 200 Mont. at 270; Brown, ¶ 16.

In Dieziger, like Strong in this case, the defendant made no motion to suppress and no suppression hearing was ever held, therefore, there was no evidentiary record upon which to review defendant's claims and dismissal was an inappropriate remedy. 200 Mont. at 270. Strong has not argued for suppression of any evidence in this case. Having only argued for dismissal--which is an unavailable and inappropriate remedy--Strong's appeal should be dismissed.

Strong's reliance on State v. Gatlin, 2009 MT 348, 353 Mont. 163, 219 P.3d 874, is misplaced. The issue in Gatlin was not, as here, whether there was unnecessary delay between arrest and initial appearance pursuant to Mont. Code Ann. § 46-7-101. Gatlin, ¶ 21 (record was clear that Gatlin had initial appearance without unnecessary delay). The issue in Gatlin, was whether the appropriate remedy for failure to inform Gatlin of his right to counsel at the initial appearance in violation of Mont. Code Ann. §§ 46-7-102 and 46-8-101, was vacation of his conviction and dismissal of the charges, and ultimately whether dismissal should be with or without prejudice. Gatlin, ¶¶ 23-29.

Gatlin, therefore, is not controlling, because it had nothing to do with application of the "unnecessary delay" requirement in Mont. Code Ann. § 46-7-101 at issue in this case, and Strong did not move to dismiss for failure to be advised of his right to counsel. The remedy for such failure may, pursuant to Gatlin, be dismissal, but there is no logical extension of that decision to establish dismissal as the proper remedy for violation of Mont. Code Ann. § 46-7-101--particularly in light of authority to the contrary. Brown, ¶ 16; Dieziger, 200 Mont. at 270; Benbo, 174 Mont. at 261-62.

Though he does not directly cite the case in his brief, Strong's reliance on a quotation from Fitzpatrick v. Crist is likewise misplaced. (See Br. of Appellant at 15 (citing Gatlin ¶ 22 (internal quotation marks and citation omitted).) The delay at issue in that case--which so "shocks one's concept of fundamental fairness and due process"--was not the delay of defendant's initial appearance (3 days), but rather the delay in appointing counsel (4 months). Fitzpatrick v. Crist, 165 Mont. 382, 384, 385, 387, 528 P.2d 1322, 1323-25 (1974). There was no unreasonable delay of the appointment of counsel for Strong in this case--in fact counsel was appointed before the initial appearance (D.C. Doc. 5)--and he has not moved to dismiss on that ground. Strong's argument on appeal must fail because his right to counsel--of which he was clearly advised and took advantage--is not at issue here, as it was in Crist and Gatlin.

II. THE DISTRICT COURT PROPERLY AND WITHIN ITS DISCRETION DENIED STRONG'S MOTION FOR MISTRIAL.

A. Standard of Review

A trial court has broad discretion in determining the relevance and admissibility of evidence. State v. Berger, 1998 MT 170, ¶ 39, 290 Mont. 78, 964 P.2d 725. This Court generally reviews evidentiary rulings for an abuse of discretion. State v. Passmore, 2010 MT 34, ¶ 51, ___ Mont. ___, ___ P.3d ___. This Court likewise reviews a district court's ruling on a motion for mistrial to determine whether the court abused its discretion. State v. Duffy, 2000 MT 186, ¶ 34, 300 Mont. 381, 6 P.3d 453 (citing State v. Partin, 287 Mont. 12, 17, 951 P.2d 1002, 1005 (1997)).

B. The District Court Properly Admitted, on Redirect Examination, Finneman's Explanation of the Circumstances and Influences Under Which She Made An Inconsistent Statement to Police With Which Strong Impeached Her Credibility on Cross-Examination.

As was clearly permitted under Mont. R. Evid. 611(b) and 613, Strong impeached Finneman's credibility on cross-examination with her prior inconsistent statement to police. (Tr. at 198-99.) See State v. Lias, 218 Mont. 124, 126, 706 P.2d 500, 502 (1985). Strong's impeachment of Finneman on cross-examination was a new matter introduced by Strong and the State was entitled on redirect to inquire into the reasons for Finneman's inconsistent statement.

A district court has broad discretion to determine whether evidence is relevant and admissible. Berger, ¶ 39. The court, likewise, has wide discretion in determining the scope and extent of re-examination as to new matters brought out on cross-examination. Cline v. Durden, 246 Mont. 154, 161, 803 P.2d 1077, 1081 (1990) (citing State v. Heaston, 109 Mont. 303, 316, 97 P.2d 330 (1939)); see Mont. R. Evid. 611(d). By inquiring into new matters on cross-examination, counsel "effectively over[comes] his own objection to matters contained therein and open[s] the door for further inquiry on redirect." Durden, 246 Mont. at 161.

"When one party cross-examines a witness regarding an event, the witness may be re-examined for the purpose of elaborating on the event to explain what is already in existence." State v. Duffy, 2000 MT 186, ¶ 43, 300 Mont. 381, 6 P.3d 453 (citing Berger, ¶ 41). "The jury is entitled to a complete explanation, even if that explanation reflected poorly upon [the defendant]." Berger, ¶ 41. Thus, it was not an abuse of discretion to allow a witness to explain that one of the reasons she moved was because of threats and an assault by defendant. Berger, ¶ 41; see also Cissel v. Western Plumbing & Heating, 188 Mont. 149, 157-58, 612 P.2d 206, 210-11 (1980) (evidence of threats, and the fear of threats being carried out, was relevant to show a motive to testify falsely and properly admitted over relevancy objection). It has been held that evidence is admissible that shows a witness feared a defendant in a criminal case because of threats made to the witness by the

defendant or an assault on the witness by the defendant, despite the fact such evidence also shows the defendant may be guilty of another crime. Cissel, 188 Mont. at 157 (citing Commonwealth v. Williams, 393 N.E.2d 937, 942 (Mass. 1979); Commonwealth v. Douglas, 236 N.E.2d 865, 874 (Mass. 1968)).

The credibility of witnesses is exclusively the province of the trier of fact and, in the event of conflicting evidence--including the inconsistent statements of one witness--it is within the jury's province to determine which will prevail. State v. Kelley, 2005 MT 200, ¶ 22, 328 Mont. 187, 119 P.3d 67; see State v. Neary, 284 Mont. 409, 416, 944 P.2d 750, 755 (1997) (following attempted impeachment, witness was allowed to explain inconsistencies in his previous testimony and the jury was free to weigh that testimony). Therefore, where a witness is impeached by a statement or writing made by him, he may explain the circumstances under which such statement was made. State v. Keays, 97 Mont. 404, 418, 34 P.2d 855, 861 (1934) (citing Kennelly v. Savage, 18 Mont. 119, 44 P. 400 (1896); Du Vivier v. Phillips, 18 Mont. 370, 45 P. 554 (1896); Wigmore on Evidence, sec. 1044).

On redirect, the State may properly explain new, contradictory material, even though the explanation may contain information adverse or prejudicial to the defendant. As this Court has said, "To impeach is drastic surgery; explanation

must not be denied on the ground it may go too far, or have prejudicial overtones." State v. Board, 135 Mont. 139, 145, 337 P.2d 924, 928 (1959).

The rationale behind the rule has been explained as follows:

> Since the principal object of the rule requiring the cross-examiner to lay the foundation for impeachment by interrogating the witness as to his former statements is to prevent injustice to the witness by giving him an ***opportunity to recollect the facts and to explain any apparent inconsistency***, it follows that the ***opportunity should not be denied on the re-examination***. The witness may then be allowed to reaffirm or explain such statements, their meaning and design, and to give the circumstances and influences under which they were made.

Keays, 97 Mont. at 418 (emphasis added) (quoting 5 Jones on Evidence, p. 232); see Board, 135 Mont. at 145; Mont. R. Evid. 613(b) (extrinsic evidence of prior inconsistent statements not admissible unless the witness is afforded an "opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon").

This Court has similarly held that once a party opens the door regarding certain evidence, the opposing party has the right to offer evidence in rebuttal, including evidence of other acts. State v. Veis, 1998 MT 162, ¶ 18, 289 Mont. 450, 962 P.2d 1153 (citing State v. McQuiston, 277 Mont. 397, 403, 922 P.2d 519, 523 (1996); Durden, 246 Mont. at 161; Mont. R. Evid. 611(d)). When on cross-examination the defendant opens the door to impeach a prosecution witness, the State is entitled to rehabilitate the witness's credibility and explain what motivated the witness to make the prior false evidence. Veis, ¶ 18. As such, the

explanatory evidence is not offered for the purpose prohibited by Mont. R. Evid. 404, and the Just requirements do not apply. Veis, ¶ 17.

Here, Strong opened the door regarding Finneman's credibility and her prior inconsistent statement to police. Finneman admitted she was not telling the truth in her prior statement, but she explained that she changed her story because she was scared of Strong, and she was scared because Strong had been violent toward her in the past. The district court properly concluded that Strong raised Finneman's credibility and her inconsistent statement, and that the State was allowed to explain why it was different. (Tr. at 200.) The district court explained that the question and answer on redirect were logical under the circumstances, that the jury was entitled to hear and consider the testimony, and the testimony did not get into "other acts." (Tr. at 251-52.)

Under the above long-standing authority, it was not an abuse of discretion in this case to allow Finneman to explain the reasons she lied to police--a fact brought into question by Strong on cross-examination. Consistent with that authority, the district court admonished the State to limit its use of the evidence at issue--"don't push it beyond that" and do not get into the issue of Strong's violence in closing argument. (Tr. at 200, 252.) See Veis, ¶ 19 (testimony was very limited); Board, 135 Mont. at 145 (court was "most diligent to keep the redirect in bounds" and the evidence of bad acts was "relevant, natural, close and proper"). Given the State's

limited use of the evidence consistent with the district court's admonishment, Finneman's testimony did not go beyond the permissible and relevant scope of redirect to explain her inconsistent statement, its "meaning and design," and the "circumstances and influences" under which she made the statement. See Keays, 97 Mont. at 418; Board, 135 Mont. at 145. Just as in Berger, the jury here was entitled to a complete explanation, even if that explanation reflected poorly upon Strong. Berger, ¶ 41.

Finally, Strong's motion in limine regarding prior bad acts would not prohibit, under the circumstances, Finneman's testimony in response to, and explanatory of, Strong's attack on her credibility. First, the district court ruled that it would not be making a "blanket exclusion" of all bad act evidence, and stated, "If it comes up during trial, make an appropriate objection and we will consider it at that time." (Tr. at 40-41.) That is what happened here. In addition, a motion in limine may not properly prevent the use of prior inconsistent statements for impeachment purposes under Mont. R. Evid. 613. Lias, 218 Mont. at 127. It should follow, therefore, that a motion in limine may also not properly prevent the use of evidence explanatory of prior inconsistent statements used for impeachment.

Here, the motion in limine would prohibit the use of impermissible character evidence in violation of Mont. R. Evid. 404(b), but not evidence introduced for the purposes of responding to and explaining inconsistent statements raised by the

defense. When Strong chose to attack Finneman's credibility for not telling the truth to police, he opened the door to any explanation of why she lied, including the explanation that she did so because she was scared and because Strong had been violent to her in the past. Strong effectively overcame his objection to what might come through that open door. Durden, 246 Mont. at 161.

C. Even if Finneman's Testimony Were Inadmissible, Denial of Mistrial Was Within the Court's Discretion Given the Strength of the Evidence Against Strong Outweighing the Limited Prejudice of the Testimony and the Need for a Curative Instruction.

A district court's determination of whether to grant a motion for a mistrial must be based on whether the defendant has been denied a fair and impartial trial. State v. Weldele, 2003 MT 117, ¶ 75, 313 Mont. 452, 69 P.3d 1162. Where there is a reasonable possibility that inadmissible evidence might have contributed to the conviction, a mistrial is appropriate. State v. Partin, 287 Mont. 12, 18, 951 P.2d 1002, 1005 (1997). In determining whether a prohibited statement contributed to a conviction, this Court considers the strength of the evidence against the defendant, the prejudicial effect of the testimony, and whether a cautionary instruction could cure any prejudice. State v. Scarborough, 2000 MT 301, ¶ 81, 302 Mont. 350, 14 P.3d 1202. Of course, this Court need not engage in such balancing here in order to affirm the district court's denial of Strong's motion for mistrial, because Finneman's testimony was properly admitted. Unlike Partin, it is not "undisputed"

that the evidence at issue here was inadmissible. Partin, 287 Mont. at 18. See supra at 22-28.

The evidence against Strong was not "conflicting and weak." Partin, 287 Mont. at 18-19. Though much of the evidence against Strong "was circumstantial, nevertheless, it was strong." See State v. Johnson, 1998 MT 289, ¶ 43, 291 Mont. 501, 969 P.2d 925. Circumstantial evidence alone may be sufficient to obtain a conviction. State v. Rosling, 2008 MT 62, ¶ 36, 342 Mont. 1, 180 P.3d 1102. This Court does not require proof from an eyewitness in order to convict of criminal conduct. State v. Sage, 221 Mont. 192, 200, 717 P.2d 1096, 1101 (1986) (conviction did not require proof that that someone saw the gun in killer's hand or saw him pull the trigger).

The State offered overwhelming evidence linking Strong to the crime and showing that the injury to K.S. could not have been accidental. No one saw Strong hurt K.S., but he was the only person in the house with K.S. when his injury occurred. Yet Strong offered no information as to how the boy was injured. (Tr. at 285.) Based on the strength of the circumstantial evidence, the jury could easily infer that Strong was the only person who could have caused the injury to K.S. When Finneman left K.S. at home alone with Strong, the boy was fine and happy, but by the time she came home he was not.

The injury itself was undisputed: a life threatening Grade III laceration of the liver. (Tr. at 230, 268-69.) It was undisputed that such an injury--Strong even looked it up on the internet (Tr. at 288)--could only be caused by significant forces, described as a severe blunt force to the abdomen and a high level of force concentrated in a small area. (Tr. at 233. 271.) Doctors gave undisputed testimony that the types of accidents that would generate the necessary forces included motor vehicle accidents, falls from a height greater than ten feet, being run over by a wagon or automobile, or being kicked by a horse, none of which happened in this case. (Tr. at 233-34, 271-72.)

The injury to K.S. could not have been caused by himself, by jumping off furniture, or running into a table or sharp corner. (Tr. at 234, 272-73.) These latter were the types of possible causes of K.S.'s injury that Strong proffered to Finneman and to the police: maybe he fell on a toy, we were playing a game of running and jumping on the bed, he fell out of the crib. (Tr. at 190.) Given the undisputed medical testimony, Strong's explanations for a Grade III liver laceration were implausible and the jury was entitled to make every reasonable inference from the circumstantial evidence, including "the other option . . . potential abuse." (Tr. at 233.)

Therefore, the strength of the evidence against Strong weighs heavily against mistrial. It was the evidence that Strong was alone with the boy when he was

injured, without plausible explanation of any accidental cause, that convicted Strong--not Finneman's statement that Strong "was violent toward me in the past."

Finneman's statement had a relatively low prejudicial effect which also weighs against mistrial. First, the context is important: this was not a statement made on direct examination as proof of the material elements of the crime. It was made on redirect in immediate response to the impeachment of the witness by Strong on cross-examination. Strong impeached Finneman and she admitted she lied to police about where Strong and K.S. were sitting when she got home. Finneman's statement about Strong's violence had to do with why she lied--a fact elicited by Strong--not about how or why Strong caused injury to K.S.

Second, the statement that Strong "was violent toward me" was general, identified no specific acts, and thus did not constitute the type of direct other crimes evidence that "inevitably involves prejudice to the defendant." State v. Giddings, 2009 MT 61, ¶ 84, 349 Mont. 347; 208 P.3d 363 (citing Partin, 287 Mont. at 19 (a detective testified about defendant's prior arrest); Mont. R. Evid. 404(b)). Finneman did not say anything about Strong's other criminal convictions, incarceration, or probation. Finneman did not go into any detail. Furthermore, it was just one statement and was not repeated throughout trial by either the witness or the prosecution in argument. In fact, the district court

admonished the State to go no further and to stay away from the topic in closing argument, and the State complied.

Finneman's statement here is of no more prejudice than other cases where this Court has affirmed the lower court's denial of a motion for mistrial. See, e.g., State v. Dubois, 2006 MT 89, ¶¶ 54-55, 332 Mont. 44, 134 P.3d 82 (State's reference to defendant as a "gangster" during cross-examination of a defense witness did not provide grounds for a mistrial); Weldele, ¶ 76 (where witness alluded on three different occasions to a previous, unreported domestic altercation between her and defendant, the statements were not so prejudicial to warrant a mistrial); Scarborough, ¶ 83 (no reasonable probability that inadvertent admission of defendant's probation status contributed to his conviction).

As to whether a cautionary instruction would cure the prejudice, if any, from Finneman's statement, the district court determined on the record that a specific instruction was unnecessary and the general instructions would suffice without "emphasizing anything else." (Tr. at 251-52.) The State did not object to such an instruction if desired by the defense, but Strong did not request one. (Id.) A trial judge has no duty to give a limiting instruction absent a request from the party wishing to limit the scope of the Jury's consideration of the testimony. Cissel, 188 Mont. at 158. While it is possible that a cautionary instruction may cure prejudice from an inadmissible statement, it is also true that such an instruction may call

undue attention to the prohibited testimony. This is consistent with the findings of the district court that specifically cautioning the jury was unnecessary in this case, together with Strong's choice not to request an instruction. Under the circumstances, a cautionary instruction was unnecessary to cure whatever prejudicial effect that may have resulted from Finneman's statement on redirect.

Ultimately, the testimony here did not deny Strong a fair trial, Weldele, ¶ 75, and the district court did not abuse its discretion in denying Strong's motion for a mistrial.

III. THE DISTRICT COURT IMPOSED A LEGAL SENTENCE WHEN IT ORDERED STRONG TO PAY RESTITUTION TO BLUE CROSS BLUE SHIELD FOR THE UNDISPUTED MEDICAL EXPENSES INCURRED BY THE VICTIM.

A. Standard of Review

This Court reviews a criminal sentence for legality to determine whether the sentence is within the statutory parameters. State v. Kirkland, 2008 MT 107, ¶ 5, 342 Mont. 365, 181 P.3d 616.

Generally, this Court will not review matters raised for the first time on appeal absent an objection at the trial court level. State v. O'Connor, 2009 MT 222, ¶ 11, 351 Mont. 329, 212 P.3d 276. Despite a defendant's failure to object at the time of sentencing, however, this Court will review a sentence imposed in a criminal case, if it is alleged on appeal that such sentence is illegal.

State v. Lenihan, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). To obtain review of an unpreserved sentencing error under Lenihan, the defendant must present a colorable claim on appeal that his sentence is illegal or falls outside statutory parameters. See Kirkland, ¶ 13-14.

However, if a sentence falls within statutory parameters, a sentencing court's failure to abide by a statutory requirement may only give rise to an objectionable sentence, not necessarily an illegal one which would invoke the Lenihan exception. State v. Kotwicki, 2007 MT 17, P 13, 335 Mont. 344, 151 P.3d 892. Similarly, this Court has refused to invoke the Lenihan rule when a defendant participated or actively acquiesced in the imposition of a condition of his sentence. State v. Micklon, 2003 MT 45, 314 Mont. 291, 65 P.3d 559.

Specifically, this Court has declined to address whether an insurance company demonstrated a right of subrogation or filed an affidavit where the issues were raised for the first time on appeal. O'Connor, ¶ 13; State v. Schmidt, 2009 MT 450, ¶¶ 73-75, 354 Mont. 280, ___ P.3d ___ (no objection to the amount, or calculation, of restitution at the sentencing hearing or to the lack of a sworn affidavit). These are the same issues that Strong now raises for the first time on appeal in this case and this Court should decline to review them.

B. The Restitution Order Was Within Statutory Parameters and Strong Makes No Colorable Claim That Blue Cross Blue Shield Is Not an Insurer With a Right of Subrogation.

A sentencing court shall "require an offender to make full restitution to any victim who has sustained pecuniary loss, including a person suffering an economic loss." Mont. Code Ann. § 46-18-241(1); see also Mont. Code Ann. § 46-18-201(5). "Pecuniary loss" means all special damages substantiated by evidence in the record that a person could recover against the offender in a civil action, "including without limitation out-of-pocket losses, such as medical expenses." Mont. Code Ann. § 46-18-243(1)(a). The definition of "victim" includes "an insurer or surety with a right of subrogation to the extent it has reimbursed the victim of the offense for pecuniary loss." Mont. Code Ann. § 46-18-243(2)(a)(iv); State v. Sharp, 2006 MT 301, ¶ 8, 334 Mont. 470, 148 P.3d 625 (restitution was appropriate where insurance company reimbursed victim for losses and was, therefore, entitled to subrogation to that extent).

Strong objected at sentencing that Blue Cross Blue Shield was not a "victim" and therefore should not be entitled to restitution for the medical expenses incurred by K.S. and admittedly paid for by Blue Cross Blue Shield. (Tr. at 382.) However, that objection was based on a different statutory provision and a different theory than Strong asserts now on appeal. Below, Strong argued restitution was appropriate for the "out-of-pocket costs" of the victim or his

mother, but was inappropriate "if there's no punitive loss to the victims that's defined in 46-18-112(1)(e)." (Tr. at 382.) Clearly, under Mont. Code Ann. § 46-18-112(1)(e) and (f), there was both "harm caused, as a result of the offense, to the victim, the victim's immediate family, and the community," and "pecuniary loss." (See PSI at 6, 9.)

On appeal, Strong's theory has changed and he now claims that restitution to Blue Cross Blue Shield was "illegal" under a different statute, because there was no evidence that the insurance company that admittedly paid the medical expenses on behalf of K.S. had a right of subrogation. Significantly, Strong does not argue on appeal that Blue Cross Blue Shield does not have a subrogation right.

The relevant statutory requirement is that the insurer-victim have a right of subrogation. Mont. Code Ann. § 46-18-243(2)(a)(iv). But Strong's objection on appeal is that there was no evidence of such a right, not that Blue Cross Blue Shield does not in fact have such a right. Thus, Strong's claim on appeal amounts to one of an objectionable sentence that could have been corrected if raised--i.e., that the State did not introduce the insurance agreement or other evidence of the subrogation right--rather than a colorable claim that the restitution was illegal, regardless of whether Strong objected--i.e., that Blue Cross Blue Shield did not in fact have a right of subrogation and restitution was not authorized under the

statute. This Court should decline to review this issue on appeal, just as it did on the same issue raised for the first time on appeal in O'Connor, ¶ 13.

Should this Court reach the merits, it should uphold the restitution order as a legal condition of Strong's sentence. There is no question that Strong's criminal activity caused actual harm to K.S., his family, and community. Mont. Code Ann. § 46-18-112(1)(e). There is no question that the insurance company suffered a pecuniary loss, a loss K.S. would have suffered but for his mother's health insurance coverage. Mont. Code Ann. § 46-18-112(1)(f). Strong did not object to or contest the applicable provisions of the PSI or the fact that Blue Cross Blue Shield paid the amount reported in the PSI and testified to at sentencing, $11,194.11. (Tr. at 350-51, 374, 382.) Based on the evidence presented--and without objection, dispute, or evidence to the contrary regarding Blue Cross Blue Shield's subrogation right--the district court ordered the $11,194.11 restitution, finding, "They were out that sum simply because of an insurance contract. I look at them as a victim." (Tr. at 397.)

To the extent necessary for judgment, it is a reasonable implied finding of fact that Blue Cross Blue Shield paid the medical expenses under a typical insurance contract containing a right of subrogation. See State v. Wright, 2001 MT 282, ¶ 9, 307 Mont. 349, 42 P.3d 753 (doctrine of implied findings). This Court has held that restitution was appropriate where an insurance company

reimbursed a crime victim for losses and was, therefore, entitled to subrogation to that extent. Sharp, ¶ 8. Under the circumstances, the restitution order was within statutory parameters and should be upheld.

Finally, Strong's ineffective assistance of counsel claim on this point must fail, because there is a plausible tactical justification for his attorney's failure to object to the lack of evidence of a subrogation right. See State v. Kougl, 2004 MT 243, ¶¶ 14-15, 323 Mont. 6, 97 P.3d 1095. That plausible justification is simply that Strong and his counsel did not dispute the existence of Blue Cross Blue Shield's subrogation right.

It is clear on the record that Strong did not object to or contest the harm to K.S., the injuries he sustained, and the need for medical attention. Strong did not object to or contest that Blue Cross Blue Shield had paid the amount ordered in restitution. In the context of this case, there really was no question from Strong about the insurer's payment of the medical expenses. Without some indication, on the record or on appeal, that the largest health insurer in the State of Montana did not have a subrogation right in this case, it is quite plausible that the subrogation right simply was not at issue.

Even on appeal Strong does not assert that Blue Cross Blue Shield does not have a subrogation right. It is most plausible in this case that counsel did not object below for the same reason Strong does not assert on appeal that Blue Cross

Blue Shield had no subrogation right--because it isn't true. And that is not ineffective assistance of counsel.

C. Strong Did Not Object to the Amount of Restitution He Was Ordered to Pay to Blue Cross Blue Shield, or to the Lack of an Affidavit.

There are certain statutory requirements relating to documentation of restitution. The PSI is required to address, among other things, "the harm caused, as a result of the offense, to the victim, the victim's immediate family, and the community" and "the victim's pecuniary loss, if any." Mont. Code Ann. § 46-18-112(1)(e), (f). In addition, the PSI shall contain "an affidavit that specifically describes the victim's pecuniary loss and the replacement value in dollars of the loss, submitted by the victim." Mont. Code Ann. § 46-18-242(1)(b). While the Montana Rules of Evidence do not apply to a sentencing hearing, Mont. R. Evid. 101(c)(3), a defendant has the right to have a sentence imposed based upon "substantially correct information." State v. Coluccio, 2009 MT 273, ¶ 40, 352 Mont. 122, 214 P.3d 1282.

This Court has upheld the affidavit requirement of Mont. Code Ann. § 46-18-242, and held the failure to include an affidavit required remand to the district court for compliance with the statutory provisions. State v. Hunt, 2009 MT 265, ¶ 22, 352 Mont. 70, 214 P.3d 1234. However, objection to the affidavit requirement at sentencing is required. State v. Schmidt, 2009 MT 450, ¶¶ 73-75,

354 Mont. 280, ___ P.3d ___. In Schmidt, the defendant did not object at the sentencing hearing to the lack of a sworn affidavit, or to the amount, or calculation, of restitution. Schmidt, ¶¶ 74-75. Neither did Strong in this case. This Court should likewise determine here that the district court's "imposition of restitution satisfies § 46-18-242, MCA." Schmidt, ¶ 75; see also O'Connor, ¶ 13. While the lack of a sworn affidavit as required by statute may be objectionable, such a lack unobjected to does not render the sentence "illegal," particularly in a case such as this where Strong admitted on the record that the amount of the restitution was not in dispute. This Court should not address this issue raised for the first time on appeal without any colorable claim that the lack of affidavit renders the restitution illegal.

This Court should also reject Strong's ineffective assistance of counsel claim relating to the failure to object to the lack of an affidavit with the PSI. Strong clearly did not dispute the dollar amount of the medical expenses paid by Blue Cross Blue Shield. (Tr. at 374, 382.) Since Strong had effectively stipulated to the pecuniary loss at issue, it was unnecessary for that information to be presented in an affidavit.

This Court has accepted sworn testimony at sentencing to satisfy the affidavit requirement of Mont. Code Ann. § 46-18-242(1). Coluccio, ¶ 37. It would be incongruous to require an affidavit in this case with a similar suitable

substitute for the affidavit requirement: the defendant's admission on the record that he does not object to the amount of restitution claimed. Counsel would have plausible justification, Kougl, ¶¶ 14-15, and it would not be ineffective, to refrain from objecting to the lack of an affidavit under the circumstances of this case, where Strong has effectively stipulated to the substantive content of the affidavit, and requiring an affidavit, as a formality, would serve no additional purpose.

CONCLUSION

This Court should affirm the district court's orders and judgment convicting Strong of aggravated assault against his two-year old son.

Respectfully submitted this 5th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be hand delivered to the basket in the reception area at the Attorney General's office at 215 North Sanders, Helena, MT for :

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,907 words, excluding certificate of service and certificate of compliance.

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